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Book Review: *Mental Disorder, Work Disability, and the Law*

Michael L. Perlin

R.J. Bonnie and J. Monahan, eds., *Mental Disorder, Work Disability, and the Law* (Chicago: University of Chicago Press, 1997): 321 pp., ISBN 0-226-06450-6 (cloth), \$27.50. To order, call 1-800-621-2736.

Work and love, Freud wrote, are the “foundation” of the “emotional lives of human beings.”¹ The social theorist Sebastian de Grazia added, many years later, “without work, [the American] is a damned soul.”² It has been said that “*Without work, one loses one’s condition of being an adult.*”³

Most of us take for granted the essentiality of work. Yet, for persons with mental disabilities—especially *severe* mental disabilities—the reality of the world is quite different. Three-quarters of the latter universe is chronically unemployed; those employed worked mostly on a part-time basis, averaging twenty-two hours of work per week.⁴ It should be no surprise that such individuals “fare particularly poorly in the labor market.”⁵ But it should be no less surprising that even the most severely mentally disabled persons frequently express the *desire* to work.

When I was director of New Jersey’s Division of Mental Health Advocacy (then, the largest state-wide legal advocacy office for persons institutionalized because of mental disability),⁶ complaints about lack of work regularly trailed only complaints about involuntary medication on the list of patient grievances about the conditions of their confinement. And, for a few years in the 1970s, courts seemed sympathetic to patients’ arguments, and began to rule that, as part of the right to treatment, any work done by institutionalized psychiatric patients had to be voluntary, therapeutic, and compensated;⁷ that the federal Fair

Labor Standards Act applied to institutional work programs;⁸ and, in a case ultimately settled by consent order, that a specified percentage of all hospitalized patients had a right to participate in voluntary, therapeutic, and compensated work programs.⁹ This line of cases crashed in the early 1980s (following a series of excruciatingly complex decisions about the scope of the Tenth Amendment and the commerce clause),¹⁰ and the issue basically fell off the radar screen of public interest lawyers who represent mental patients.¹¹ And it appears to be of even less interest to legal academics.¹²

I point this out to underscore one of the anomalies that is addressed, in part, by a new thought-provoking and important collection of essays brought together by Professors Richard Bonnie and John Monahan, *Mental Disorder, Work Disability, and the Law*. Bonnie is clear in his introductory chapter: issues of work disability have been “outside the mainstream of scholarship in mental health law,”¹³ and marginalization has meant that the many important and difficult issues raised by work disability have *not* been subject to the kind of searching scrutiny that has brought virtually every other aspect of public mental disability law under the academic microscope.

This is all the more disconcerting because of the hyperattention that is paid to the Americans with Disabilities Act (ADA),¹⁴ a law hailed by advocates for persons with disabilities as “a breathtaking promise,”¹⁵ “the most important civil rights act passed since 1964,”¹⁶ as the “Emancipation Proclamation for those with disabilities,”¹⁷ and, “without question, Congress’ most innovative attempt to address the pervasive problems of discrimination against physically and mentally handicapped citizens.”¹⁸ Yet, at first blush, little in the first generation of ADA cases reflects efforts to remediate this “grotesque history” or deals frontally with these “crushing ... burdens.”¹⁹

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One of the great dilemmas of work disability law, of course, is the tension between the ADA and benefit/entitlement programs, such as Supplemental Security Income or Social Security Disability Insurance, that premise benefit eligibility on an individual's "inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which ... has lasted or can be expected to last for a continuous period of not less than 12 months."²⁰ A recent article by Frank Ravitch explores this relationship, concluding that the ADA's duty to accommodate reasonably should not provide the Social Security Administration with an additional basis for denying benefits or expanding the list of jobs that can be performed by individuals with given disabilities.²¹ Yet, this tension between the two approaches—one based on work accommodation and one based on work inability—dominates this entire area of the law.

Bonnie sets out the operating dilemma in this manner:

Advocates for people with mental disabilities have been persistently dissatisfied with the operation of work disability laws, and it is not hard to see why. On the one hand, the rate of labor force participation among persons with serious mental disorders is very low, even when compared with the rate of labor force participation among people with physical conditions, and there is no evidence that the Americans with Disabilities Act has improved this dismal picture.... On the other hand, even though people with mental disorders represent an increasing fraction of disability benefit recipients, mental disability advocacy groups argue that many seriously disabled people who are unable to compete in the labor market are unfairly denied benefits.²²

This basic conflict, then, is at the core of the important policy debate on work and disability: Are persons with mental disability unfairly excluded from the workplace (perhaps because of unfounded assumptions or stereotypes that have developed about such persons and their "laziness" or their "inability to cope" in a work environment), or, contrarily, do allegedly prophylactic civil rights laws give the *marginally* disabled (or those who are not, but claim to be) inappropriate leverage either by threatening ADA-based litigation or by successfully seeking benefits that have the effect of discouraging such persons from ever entering the work force?

This is an important conflict, and it reflects both the ambivalence with which we treat the underlying issues, and the basic unresolved tensions in other aspects of the mental disability law system—tensions caused by what I call *sanism*, the irrational prejudice of the same quality and character of other irrational prejudices that cause (and are reflected in) prevailing social attitudes of racism, sex-

ism, homophobia, and ethnic bigotry.²³ The essays collected by Bonnie and Monahan offer us an important first step on the path toward understanding the relevant issues and toward solving a difficult dilemma.

The editors chose to divide this book into four sections, and those sections effectively cover the pertinent universe of issues: (1) a "wide-angle lens"²⁴ examination of the epidemiology of mental disorders, work disability, and labor force participation; (2) an investigation of the *choices* made by persons with mental disabilities as to whether to seek benefits; (3) an examination of the various disability benefits programs for which persons with mental disabilities may be eligible; and (4) an examination of the role and potential consequences of the ADA. These four different focal points provide readers with the tools needed to assess thoughtfully and reflectively the policy decisions that permeate this area of the law.

So what do we learn from this book? We learn that the vast majority of persons with severe mental disorders are unemployed,²⁵ and that, of those who are employed, a majority work part-time at unskilled jobs, often in a "supported" (for example, sheltered workshop, transitional, or work-training) job program.²⁶ We also learn that only about one-quarter of such persons receive a government disability payment because of their mental illness, but that this number is increasing.²⁷ We learn further that labor force participation is much lower among persons with mental disabilities than with physical disabilities, that mental disability "accentuates" other labor market disadvantages, and that persons with mental disabilities do not reap the benefits of an expansive labor market.²⁸

We learn further that a connection exists between role identity and disability: "the loss of self, self-esteem, valued social role, and other aspects of a nonpatient identity that accompany self-labeling may lead to taking on or may reinforce the sick role, resulting in a poorer life and illness course."²⁹ Just as important, "progressive role constriction and the fusion of identity with illness among persons with major mental illness contributes to, indeed constitutes, chronicity."³⁰ In one of the strongest contributions to the book, Sue Estroff et al. thus conclude:

Overall, the event-history findings demonstrate that it is a combination of dysfunction, dependence, and despair that direct individuals to disability income.... Living on disability is a harsh reality of being mentally ill—seldom, it seems, a personal choice but more a matter of necessity. The many costs of being on disability challenge us to find alternatives to "no other way to go."³¹

Questions of choice are also explored from different perspectives. John Strauss and Larry Davidson make the important point that researchers need to turn their atten-

tion to "the context of individuals' actual lives to help us determine who can best benefit from [the] advances [reflected in the ADA], in obtaining what kind of work, at what point in the course of which illnesses, through which kind of accommodations, and in what work sites."³² And Richard Warner and Paul Polak look at the "significant disincentives" that face persons with mental disabilities who seek to begin work or increase their working hours.³³ Finally, Laurie Lee Hall sets out a practical and comprehensive blueprint for a new research agenda that can best make the ADA actually *work* for persons with severe mental illnesses.³⁴

Bonnie and Monahan pick up the theme of this agenda in their epilogue, and highlight five areas that should be addressed in the next generation of work disability research—the experience of workers with diagnosed mental disorders; the public health perspective on the underlying questions; the need to integrate the study of mental disorder and *employment* with the study of mental disorder and *unemployment*; the potential use of work disability legislation to provide "leverage" in the treatment process; and the development of a comparative perspective on the questions before us.³⁵ If scholars were to read carefully the essays collected in this book, and then were to follow these directions, it is possible that we could take the first steps toward resolving some of the tensions to which I earlier referred—toward dealing with some of the systemic sanism (reflected throughout the work disability/benefit system), and toward a meaningful attempt at—finally—making that system actually work for persons with severe mental disabilities.

References

1. See S. Freud, *Civilization and Its Discontents*, ed. J. Strachey (New York: W.W. Norton, 1st American ed., 1962): at 48.
2. S. de Grazia, *Of Time, Work, and Leisure* (New York: Twentieth Century Fund, 1962): at 41.
3. S. Olshansky and L. Unterberger, "The Meaning of Work and Its Implications for the Ex-Hospital Patient," *Mental Hygiene*, 47 (1963): 141 (original emphasis).
4. See L. Milazzo-Sayre, M. Henderson, and R. Manderscheid, "Serious and Severe Mental Illness and Work: What Do We Know?," in R.J. Bonnie and J. Monahan, eds., *Mental Disorder, Work Disability, and the Law* (Chicago: University of Chicago Press, 1997): at 18–19.
5. E. Yelin and M. Cistrenas, "Employment Patterns among Persons With and Without Mental Conditions," in Bonnie and Monahan, eds., *supra* note 4, at 47.
6. See N.J. Stat. Ann. §§ 52:27E-21 to -27 (West 1998) (repealed 1994). Certain duties were transferred to Office of the Public Defender. See N.J. Stat. Ann. §§ 52:27E-50 to -65 (West 1998).
7. See, for example, *Weidenfeller v. Kidulis*, 380 F. Supp. 445, 451 (E.D. Wis. 1971); and *Wyatt v. Stickney*, 344 F. Supp. 387, 402 (M.D. Ala. 1972), *aff'd sub nom. Wyatt v. Aderholt*, 503 F.2d 1305 (5th Cir. 1974).
8. See *Souder v. Brennan*, 367 F. Supp. 808 (D.D.C. 1973).
9. See *Schindewolf v. Klein*, No. L41293-75 P.W. (N.J. Super. Ct. Law Div. 1976), reprinted in M.L. Perlin, *Mental Disability Law: Civil and Criminal* (Charlottesville: Michie, Vol. 2, 1989): § 6.23, at 509–19; compare *Davis v. Balson*, 461 F. Supp. 842 (N.D. Ohio 1978) (rejecting affirmative right to theory, but finding that countertherapeutic work assignments violated the right to treatment). The theory underlying *Schindewolf* is set out in M.L. Perlin, "The Right to Participate in Voluntary, Therapeutic, Compensated Work Programs as Part of the Right to Treatment: A New Theory in the Aftermath of *Souder*," *Seton Hall Law Review*, 7 (1976): 298–339.
10. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); see generally, Perlin (1989), *supra* note 9, §§ 6.15–.16, at 478–88.
11. See, for example, the few recent cases reported on in M.L. Perlin, *Mental Disability Law: Civil and Criminal* (Charlottesville: Michie, Cum. Supp., 1997): §§ 6.10–.20, at 283–85.
12. A law review article has not been published on this topic in at least the last eight years. See *id.*
13. R.J. Bonnie, "Work Disability and the Fabric of Mental Health Law: An Introduction," in Bonnie and Monahan, eds., *supra* note 4, at 1, 2.
14. Americans with Disabilities Act, 42 U.S.C. §§ 12101–213 (1994).
15. See B. Milstein, L. Rubenstein, and R. Cyr, "The Americans with Disabilities Act: A Breathtaking Promise for Persons with Mental Disabilities," *Clearinghouse Review*, 25 (1991): at 1240.
16. K. Jenkins, "Spotlight Finds Hoyer," *Washington Post*, May 28, 1990, at D1, as cited in K. Ackourey, "Insuring Americans with Disabilities: How Far Can Congress Go to Protect Traditional Practices?," *Emory Law Journal*, 40 (1991): at 1183 n.1.
17. "Americans with Disabilities Act of 1990: Summary and Analysis," *Special Supplement (BNA)*, at S-5 (1990), as cited in Ackourey, *supra* note 16, at 1183 n.2 (statement by bill's sponsors). See also, for example, S. Law, "The Americans with Disabilities Act of 1990: Burden on Business or Dignity for the Disabled?," *Duquense Law Review*, 30 (1991): 99–114 (describing the Americans with Disabilities Act (ADA) as a "solid and positive step toward making this country a better nation").
18. Perlin, *supra* note 11, § 6.44A, at 297 (ADA stands as Congress's "most innovative attempt to address the pervasive problem of discrimination against mentally and physically handicapped citizens"); see generally M.L. Perlin, "Make Promises by the Hour: Sex, Drugs, the ADA, and Psychiatric Hospitalization," *DePaul Law Review*, 46 (1997): 947–85.
19. See M.L. Perlin, "Where the Winds Hit Heavy on the Borderline: Mental Disability Law, Theory and Practice, 'Us' and 'Them,'" *Loyola of Los Angeles Law Review*, 31, no. 3 (1998): (in press); see also M.L. Perlin, "The ADA and Persons with Mental Disabilities: Can Sanist Attitudes Be Undone?," *Journal of Law & Health*, 8 (1993–94): 24–45.
20. Social Security Act, 42 U.S.C. § 423(d)(1) (1987); see generally E.S. Pryor, "Mental Disabilities and the Disability Fabric," in Bonnie and Monahan, eds., *supra* note 4, at 153.
21. F. Ravitch, "Balancing Fundamental Disability Policies: The Relationship Between the Americans with Disabilities Act and Social Security Disability," *Georgetown Journal on Fighting Poverty*, 1 (1994): 240–51.
22. Bonnie, *supra* note 13, at 4.
23. The classic treatment is G. Allport, *The Nature of Prejudice* (Garden City: Doubleday, 1958). For an important new,

and different, perspective, see E. Young-Bruehl, *The Anatomy of Prejudices* (Cambridge: Harvard University Press, 1996). See also M.L. Perlin, "On 'Sanism'," *Southern Methodist University Law Review*, 46 (1992): 373-407.

24. See Bonnie, *supra* note 13, at 7.

25. See Milazzo-Sayre, Henderson, and Manderscheid, *supra* note 4, at 18-19.

26. See *id.* at 18 tbl.1.

27. See *id.* at 21.

28. See Yelin and Cistrenas, *supra* note 5, at 44.

29. S. Estroff et al., "'No Other Way to Go': Pathways to Disability Income Application among Persons with Severe, Persistent Mental Illness," in Bonnie and Monahan, eds., *supra* note

4, at 94.

30. *Id.* at 95.

31. *Id.* at 96.

32. J. Strauss and L. Davidson, "Mental Disorders, Work, and Choice," in Bonnie and Monahan, eds., *supra* note 4, at 127.

33. See R. Warner and P. Polak, "Economic Opportunities and Disincentives for People with Mental Illness," in Bonnie and Monahan, eds., *supra* note 4, at 147.

34. See L.L. Hall, "Making the ADA Work for People with Psychiatric Disabilities," in Bonnie and Monahan, eds., *supra* note 4, at 273-76.

35. R.J. Bonnie and J. Monahan, "Epilogue," in Bonnie and Monahan, eds., *supra* note 4, at 299-301.